

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Charlottesville Division**

ELIZABETH SINES, SETH WISPELWEY,
MARISSA BLAIR, TYLER MAGILL, APRIL
MUNIZ, HANNAH PEARCE, MARCUS
MARTIN, NATALIE ROMERO, CHELSEA
ALVARADO, and JOHN DOE,

Plaintiffs,

v.

JASON KESSLER, RICHARD SPENCER,
CHRISTOPHER CANTWELL, JAMES
ALEX FIELDS, JR., VANGUARD
AMERICA, ANDREW ANGLIN,
MOONBASE HOLDINGS, LLC, ROBERT
“AZZMADOR” RAY, NATHAN DAMIGO,
ELLIOT KLINE a/k/a/ ELI MOSLEY,
IDENTITY EVROPA, MATTHEW
HEIMBACH, MATTHEW PARROTT a/k/a
DAVID MATTHEW PARROTT,
TRADITIONALIST WORKER PARTY,
MICHAEL HILL, MICHAEL TUBBS,
LEAGUE OF THE SOUTH, JEFF SCHOEP,
NATIONAL SOCIALIST MOVEMENT,
NATIONALIST FRONT, AUGUSTUS SOL
INVICTUS, FRATERNAL ORDER OF THE
ALT-KNIGHTS, MICHAEL “ENOCH”
PEINOVICH, LOYAL WHITE KNIGHTS OF
THE KU KLUX KLAN, and EAST COAST
KNIGHTS OF THE KU KLUX KLAN a/k/a
EAST COAST KNIGHTS OF THE TRUE
INVISIBLE EMPIRE,

Defendants.

Civil Action No. 3:17-cv-00072-NKM

**REPLY TO DEFENDANT HEIMBACH’S RESPONSE TO PLAINTIFFS’ PETITION
REGARDING RECOVERABLE ATTORNEYS’ FEES**

We write briefly in reply to Defendant Heimbach's July 3, 2019 "Motion to Appeal Sanctions" ("Def.'s Mot.") concerning Plaintiffs' petition for attorneys' fees for Defendant Heimbach's extensive discovery misconduct to date. Attempting to stave off the financial component of the various sanctions Plaintiffs are seeking, Defendant Heimbach offers a few half-hearted excuses for his willful disobedience over the course of an entire year of virtually every single obligation placed on him in discovery by the Court and the Federal Rules of Civil Procedure. He claims, for example, that "[d]ue to a lack of legal training and knowledge, Respondent Heimbach was unaware how to participate in these ongoing matters, what was expected, or how to proceed[,]" (Def.'s Mot. at 1), despite the fact that he had hired and was represented by competent legal counsel for the majority of time he was flouting his obligations. Once the Court granted Plaintiffs' motion to compel and expressly ordered Defendant Heimbach to comply, Defendant Heimbach fired those attorneys and disappeared entirely. He claims he has now "rectified" the situation by, among other things, "agreeing" to sit for a court-ordered deposition that was coupled with an unequivocal threat of incarceration should he fail to do so. (*Id.*) Plaintiffs intend to address these issues in greater detail once a more fulsome record of Defendant Heimbach's compliance with discovery is developed over the next few weeks. Suffice it to say at this point, however, Defendant Heimbach has fallen well short of his burden of showing that his failures were "substantially justified" or that "other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(5)(A)(ii-iii).

Additionally, Defendant Heimbach argues the imposition of attorneys' fees would be financially debilitating for him and his family in various respects. His conclusory claims of indigency are insufficient as both a legal and factual matter. Generally speaking, "A flat *per se* policy against the imposition of sanctions under Federal Civil Rule 37 upon any party who is

financially indigent does not accord with the purposes of that rule and would open the door to many possible abuses.” *Bosworth v. Record Data of Maryland, Inc.*, 102 F.R.D. 518, 521 (D. Md. 1984). *See also Campbell v. Nat’l R.R. Passenger Corp.*, 309 F.R.D. 21, 28 (D.D.C. 2015) (“Such a holding would grant a party *carte blanche* to abuse the discovery process.”). The bald assertion of financial hardship does not shield recalcitrant parties from financial consequences simply because the sanctions imposed would be difficult to pay. *See, e.g., Adams v. Maryland Mgmt. Co.*, No. CIV. WDQ-11-2408, 2012 WL 4889715, at *1 (D. Md. Oct. 12, 2012) (“Plaintiff’s limited financial circumstances do not excuse plaintiff from compliance with her obligations under the Federal Rules of Civil Procedure . . .”). Defendant Heimbach fails entirely to appreciate that Rule 37 sanctions are intended to deter abuses of the precise sort that Defendant Heimbach has long engaged in and to remedy the resultant prejudice to both Plaintiffs and the orderly administration of the judicial process. While Plaintiffs continue to seek an array of case-related sanctions against Defendant Heimbach in addition to attorneys’ fees, simply letting him off the hook financially would ignore and undermine the other valuable interests that Rule 37 sanctions serve. Additionally, Defendant Heimbach’s and his ex-wife’s statements of hardship without documentation or records “is not sufficiently detailed to assist the Court in balancing the need to fashion a sanction that would provide appropriate deterrence against the need to avoid being unjustly punitive.” *Campbell*, 309 F.R.D. at 29. On this record, we respectfully request that the Court hold Defendant Heimbach financially accountable for his prolonged, willful defiance and impose the fees requested.

Dated: July 15, 2019

Respectfully submitted,

/s/ Robert T. Cahill

Robert T. Cahill (VSB 38562)
COOLEY LLP

11951 Freedom Drive, 14th Floor
Reston, VA 20190-5656
Telephone: (703) 456-8000
Fax: (703) 456-8100
rcahill@cooley.com

Of Counsel:

Roberta A. Kaplan (*pro hac vice*)
Julie E. Fink (*pro hac vice*)
Gabrielle E. Tenzer (*pro hac vice*)
Joshua A. Matz (*pro hac vice*)
Christopher B. Greene (*pro hac vice*)
KAPLAN HECKER & FINK LLP
350 Fifth Avenue, Suite 7110
New York, NY 10118
Telephone: (212) 763-0883
rkaplan@kaplanhecker.com
jfink@kaplanhecker.com
gtenzer@kaplanhecker.com
jmatz@kaplanhecker.com
cgreene@kaplanhecker.com

Karen L. Dunn (*pro hac vice*)
William A. Isaacson (*pro hac vice*)
Jessica Phillips (*pro hac vice*)
BOIES SCHILLER FLEXNER LLP
1401 New York Ave, NW
Washington, DC 20005
Telephone: (202) 237-2727
Fax: (202) 237-6131
kdunn@bsfllp.com
wisaacson@bsfllp.com
jphillips@bsfllp.com

Yotam Barkai (*pro hac vice*)
BOIES SCHILLER FLEXNER LLP
575 Lexington Ave.
New York, NY 10022
Telephone: (212) 446-2300
Fax: (212) 446-2350
ybarkai@bsfllp.com

Alan Levine (*pro hac vice*)
Philip Bowman (*pro hac vice*)
COOLEY LLP
1114 Avenue of the Americas, 46th Floor
New York, NY 10036
Telephone: (212) 479-6260
Fax: (212) 479-6275
alevine@cooley.com
pbowman@cooley.com

David E. Mills (*pro hac vice*)
COOLEY LLP
1299 Pennsylvania Avenue, NW
Suite 700
Washington, DC 20004

J. Benjamin Rottenborn (VSB 84796)
WOODS ROGERS PLC
10 South Jefferson St., Suite 1400
Roanoke, VA 24011
Telephone: (540) 983-7600

Telephone: (202) 842-7800
Fax: (202) 842-7899
dmills@cooley.com

Fax: (540) 983-7711
brottenborn@woodsrogers.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2019, I filed the foregoing with the Clerk of Court through the CM/ECF system, which will send a notice of electronic filing to:

Justin Saunders Gravatt
David L. Hauck
David L. Campbell
Duane, Hauck, Davis & Gravatt, P.C.
100 West Franklin Street, Suite 100
Richmond, VA 23220
jgravatt@dhdglaw.com
dhauck@dhdglaw.com
dcampbell@dhdglaw.com

Counsel for Defendant James A. Fields, Jr.

Elmer Woodard
5661 US Hwy 29
Blairs, VA 24527
isuecrooks@comcast.net

James E. Kolenich
Kolenich Law Office
9435 Waterstone Blvd. #140
Cincinnati, OH 45249
jek318@gmail.com

Counsel for Defendants Matthew Parrott, Robert Ray, Traditionalist Worker Party, Jason Kessler, Nathan Damigo, Identity Europa, Inc. (Identity Evropa), and Christopher Cantwell

John A. DiNucci
Law Office of John A. DiNucci
8180 Greensboro Drive, Suite 1150
McLean, VA 22102
dinuccilaw@outlook.com

Counsel for Defendant Richard Spencer

Lisa M. Lorish
Federal Public Defenders Office
Western District of Virginia - Charlottesville
401 E Market Street, Suite 106
Charlottesville, VA 22902
lisa_lorish@fd.org

Fifth Amendment Counsel for Defendant James A. Fields, Jr.

Bryan Jones
106 W. South St., Suite 211
Charlottesville, VA 22902
bryan@bjoneslegal.com

Counsel for Defendants Michael Hill, Michael Tubbs, and League of the South

William Edward ReBrook, IV
The ReBrook Law Office
6013 Clerkenwell Court
Burke, VA 22015
edward@rebrooklaw.com

Counsel for Defendants Jeff Schoep, National Socialist Movement, and Nationalist Front

I further hereby certify that on July 15, 2019, I also served the following non-ECF participants, via U.S. mail, First Class and postage prepaid, addressed as follows:

Loyal White Knights of the Ku Klux Klan
a/k/a : Loyal White Knights Church of
the Invisible Empire, Inc.
c/o Chris and Amanda Barker 2634 U.S.
HWY 158 E
Yanceyville, NC 27379

East Coast Knights of the Ku Klux Klan
a/k/a East Coast Knights of the
True Invisible Empire
26 South Pine St.
Red Lion, PA 17356

Andrew Anglin
P.O. Box 208
Worthington, OH 43085

Moonbase Holdings, LLC
c/o Andrew Anglin
P.O. Box 208
Worthington, OH 43085

Andrew Anglin
P.O. Box 208
Worthington, OH 43085

Fraternal Order of the Alt-Knights
c/o Kyle Chapman
52 Lycett Circle
Daly City, CA 94015

I further hereby certify that on July 15, 2019, I also served the following non-ECF participants, via electronic mail, as follows:

Elliott Kline
eli.f.mosley@gmail.com

Matthew Heimbach
matthew.w.heimbach@gmail.com

Vanguard America
c/o Dillon Hopper
dillon_hopper@protonmail.com

s/ Robert T. Cahill

Robert T. Cahill (VSB 38562)
COOLEY LLP
11951 Freedom Drive, 14th Floor
Reston, VA 20190-5656
Telephone: (703) 456-8000
Fax: (703) 456-8100
Email: rcahill@cooley.com

Counsel for Plaintiffs